

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

JERARDO RODRIGUEZ,

Plaintiff,

v.

CV. 08-290-ST

JOHN/JANE DOE, MS. HOWTON,
CARLA TUPOU, CAPT. OGDEN, MS.
TAYOR, DENYSE GOLDADE, LT.
SCOTT, PAROLE BOARD, J. HULLY,
and GARY PFENNING,

FINDINGS AND RECOMMENDATION

Defendants.

STEWART, Magistrate Judge.

Plaintiff filed this civil action on March 7, 2008, but has not yet served defendants with summonses and a copy of his Complaint.¹ The failure to serve defendants prompted them to file a Motion to Dismiss pursuant to Fed. R. Civ. P. 4(m), which provides that the if service is not effected within 120 days of the filing of a lawsuit, the court must either dismiss the action

¹ Plaintiff, who is not incarcerated, paid the \$350.00 filing fee for this action and, therefore, is not proceeding *in forma pauperis*. Accordingly, while the court may order that service be completed by a United States Marshal, it is not required to do so. See Fed. R. Civ. P. 4(c)(3).

without prejudice, or order that service be made within a specified time.²

While defendants have not been served in accordance with the terms of Rule 4, federal courts prefer to decide cases on their merits when reasonably possible. *Eitel v. McCool*, 782 F.2d 1470, 1472 (9th Cir. 1986). Because there is no indication that defendants have suffered prejudice as a result of the delay in service, the Motion to Dismiss should be denied. If this recommendation is adopted, the court will issue a Notice of Lawsuit and Request for Waiver of Service of Summons to defendants. If defendants refuse to waive service, the court will require plaintiff to accomplish service within 90 days.

RECOMMENDATION

For the reasons identified above, defendants' Motion to Dismiss (docket #18) should be denied.

SCHEDULING ORDER

Objections to the Findings and Recommendation, if any, are due May 1, 2009. If no objections are filed, then the Findings and Recommendation will be referred to a district judge and go under advisement on that date.

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If objections are filed, then a response is due within 10 days after being served with a copy of the objections. When the

² This motion was stayed pending an appeal by plaintiff to the Ninth Circuit Court of Appeals (docket #30).

response is due or filed, whichever date is earlier, the Findings and Recommendation will be referred to a district judge and go under advisement.

NOTICE

This Findings and Recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any Notice of Appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of a judgment.

DATED this 15th day of April, 2009.

s/ Janice M. Stewart

Janice M. Stewart
United States Magistrate Judge